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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-487

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY,

Petitioner,

v.

ARTHUR LAWRENCE ABRAMS,

Respondent.

AMICUS CURIAE BRIEF OF FEDERAL BAR ASSOCIATION (NEWARK CHAPTER)

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Interest of The *Amicus Curiae*

The Federal Bar Association (Newark Chapter) was invited by the Court of Appeals to submit an amicus brief while this case was pending there. It did so. It now has the consent of the petitioner and respondent to file this brief in the Supreme Court.

The issues presented here are substantial. The rule announced by the Court of Appeals appears to be the first such judicial expression and has far-reaching effects on the powers of the District Court to control who shall be permitted to practice before it. This case has generated six opinions: the majority and dissenting opinions in the District Court's seven-to-two decision; the four opinions in the Third Circuit. The issue calls for review and decision by this Court so that all District Courts may know whether *de facto* control over disbarment proceedings before them really rests with the State Courts.

ARGUMENT

POINT I

The District Court had the power to disbar the respondent, notwithstanding the lighter sanction of suspension which he received at the hands of the New Jersey Supreme Court.

A. Power to Disbar

Article III, Section 1, of the Constitution provides:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

The judicial power includes the power to admit or exclude attorneys to or from practice before the court. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378-9 (1866). It is a power which rests exclusively with the court. *Ex parte Secombe*, 60 U.S. (19 How.) 9, 13 (1856).

In addition to the Constitution, there exist an Act of Congress and a provision of the Federal Rules of Civil Procedure which permit the District Courts to prescribe requirements for admission to practice before them. *Sanders* v. *Russell*, 401 F.2d 241, 245 (5th Cir. 1968); *In Re Crow*, 283 F.2d 685, 686 (6th Cir. 1960). The statute is 28 U.S.C. 2071 which states:

> "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

The relevant Federal Rule is F.R.Civ.P. 83, 28 U.S.C. which states:

> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

There is no uniform procedure for suspension and disbarment proceedings in the District Courts. The matter is left to the individual Districts. *In Re Echeles*, 430 F.2d 347, 350 (7th Cir. 1970). While the Local Rules vary in detail between and among the five Districts of the Third Circuit, all provide for discipline or disbarment after notice and an opportunity to be heard. In that respect

they are no different from similar rules governing practice in this Court, U.S. Sup. Ct. Rules 5 and 8, 28 U.S.C., and in the Courts of Appeals, F.R.A.P. 46, 28 U.S.C.

B. Separate Sovereigns

The ultimate judicial expression on the separate sovereignty issue is found in *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat. 415, 424 (1819)):

> "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."

That concept, as applied to the judicial control of attorneys, finds expression in *Theard* v. *United States,* 354 U.S. 278, 281 (1957), where Justice Frankfurter wrote:

> "The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included."

If for no other reason than that persons of good will often draw different conclusions from the same facts, it is inevitable that State and Federal Courts occasionally differ on the punishment to be inflicted on an attorney for a given offense. The reported cases on the point are rare but they do exist. That the act of the judiciary of one sovereign cannot bind the judiciary of the other follows inevitably from *McCulloch.* If the State is the first to take action against any attorney, that action "is entitled to respect, [but] it is not conclusively binding on the federal courts." *Re Ruffalo,* 390 U.S. 544, 547 (1968).

C. The Limiting Rule Adopted By the Court of Appeals

The Third Circuit held that the District Court's power to discipline attorneys "may be circumscribed to the extent the district court, in imposing its disciplinary sanctions, relies upon a state's legal or factual determinations. Stated otherwise, the district courts' action may be circumscribed to the extent it depends in whole or in part on a state's actions, either for the commencement of the disciplinary proceedings or for a stated basis in the determination of the sanction imposed".

This novel, limiting rule does violence to established principles of federalism. It should not be permitted to stand. Unless reversed, the State Courts could exercise effective control over all Federal Court disciplinary matters, including those in this Court.[1] Moreover, it seems clear that the District Court did not rely on the State's legal or factual determinations but came to its own independent conclusions from exactly the same record which was before the New Jersey Supreme Court.

The fact is that the New Jersey Supreme Court was not engaged in "fact finding" as that term is commonly accepted. Nor did the District Court rely on "facts" found by any other body. It found the facts itself and in the context of its own hearing.

The Supreme Court "found" nothing. It did not conduct an evidentiary hearing. The Supreme Court re-

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[1] The logical extension of the Court of Appeals rule is that this Court cannot impose a longer period of suspension on a member of the bar of this Court than was imposed by him in a State proceeding, absent a plenary hearing here. Yet this Court has regularly permanently disbarred attorneys from this Court when the States have imposed relatively short periods of suspension.

viewed the record developed before the Essex County Ethics Committee and that Committee's factual determinations. It then decided that the Committee's factual determinations were correct and imposed a sanction on Abrams which it felt was appropriate.

In its disciplinary action the District Court obtained the identical Ethics Committee record which was before the Supreme Court. The District Court offered Abrams the opportunity to submit additional facts if he so desired. He chose *not* to do so, his counsel stating: "We are prepared to submit on the record". Tr. p. 27, June 24, 1974.

Additionally, Abrams had argued in his brief to the Supreme Court that he had not known that the $20,000 payment was being made to Flaherty, the public official. The Supreme Court concluded otherwise. At the subsequent District Court proceeding Abrams' counsel acknowledged that his client had known the money was being paid to Flaherty.

In short, not only did the District Court *not* rely on facts found by the Supreme Court, it made an independent factual analysis based in part by a concession of fact by Abrams to it, where there had been a previous denial to the State Court. The facts surrounding Abrams' conduct are not in dispute; the only issue is the appropriate sanction warranted by the facts.[2] Two responsible Courts,

[2] It is difficult to see how the Court of Appeals, under any traditional scope of review approach, could bar the District Court from considering the "commission aspect" of the State record. The District Court had the State record before it. The conclusion reached by the District Court was one which fairly could be reached from that record. Abrams chose not to supplement the record and his

(Footnote continued on following page)

independently reviewing the same record, concluded that different sanctions were appropriate. Stripped to the bones, that is all there really is to the differences between the State and Federal proceedings.

The fact that the District Court referred to the *Colsey* case reflects nothing more than the observation that New Jersey had disbarred that attorney for conduct similar to that of Abrams. It was not cited for purposes of *stare decisis*. Indeed, it reflected nothing more than the District Court's conclusion that the Supreme Court had permitted disparity in treatment between the two lawyers. The District Court was not required to impose the same sanction the State had given Colsey. It chose to do so. It was not required to impose the less severe sanction given to Abrams. It chose not to do so for the reason that Abrams' conduct, in its opinion, was like Colsey's.

This issue also seems to have been considered in *Hancock* v. *Andrews*, 161 F.2d 547 (5th Cir. 1947). The attorney was given a reprimand by a Georgia State Court and thereafter penalized with a six-month suspension by the District Court. On appeal it was urged that the State reprimand "should have been accepted by the Federal Court as conclusive". This argument was not accepted, the Court of Appeals holding that "disciplinary action

(Footnote continued from preceding page)

counsel acknowledged that the District Court had the power ". . . to discipline as it appears to the court the discipline should be . . ." As the Third Circuit itself has held, an attorney who has been disciplined in the State Court is not entitled to a trial *de novo* in the District Court when disciplinary action thereafter is undertaken against him. The attorney who has "the duty of coming forward with evidence to rebut the state court record". *Petition of the Committee of Censors of the Philadelphia Bar Association*, 307 F.2d 880 (3d Cir. 1964), cert. den., 371 U.S. 923 (1962).

taken by the State Courts against an attorney for unprofessional conduct in a case pending in the Federal Court does not preclude the Federal Court also from taking action in such a matter". 161 F.2d at 548.

The final point is this: the danger in the Court of Appeals opinion is that it appears to command District Courts to follow blindly the conclusions reached by the State Courts when the facts before them are the same and the only issue is the appropriate penalty. Each Court must decide the penalty question itself, as it sees the right and the wrong and as it implements its own concepts of propriety for the members of its bar. In the last analysis each Court must bear the ultimate responsibility for the lawyers it permits to practice within its own precints.

The decision of the Court of Appeals is in derogation of principles of federalism and should be overturned. This Court should announce what the correct standard is: each Court must be the master of its own house.

POINT II

Scope of Review

Since the District Court had the power to disbar Abrams, a primary issue on appeal has to be what is the appropriate scope of review the Court of Appeals should have employed. The cases establish that a reversal could only have been entered if that Court concluded that the seven District Court Judges abused their discretion in deciding to disbar the attorney. See *Hancock* v. *Andrews, supra,* which holds that the District Court has "wide discretion" in entering an Order in a disciplinary case and that it has to be shown that "such discretion was abused". 161 F. 2d at 549.

Perhaps the best reasoned "scope of review" decision is one written by Chief Justice Marshall. In *Ex parte Burr*, 22 U. S. (9 Wheat.) 168 (1824), an attorney sought a motion to mandamus the lower Federal Court to restore him to practice. He had been suspended for one year. The Supreme Court opinion holds:

> "On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, the same means of information as the court itself. *If there be a revising tribunal, which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case.*
>
> "Some doubts are felt in this court respecting the extent of its authority as to the conduct of the circuit and district courts towards their officers; but without deciding on this question, *the court is not inclined to interpose, unless it were in a case where the conduct of the circuit or district court was irregular, or was flagrantly improper.*" (Emphasis supplied)

The issue on appeal may be stated in these terms: In a case where all the Federal Judges who voted on the

case concluded that the attorney's conduct was unethical and merited suspension from practice, did seven of the nine District Judges abuse their discretion by imposing a more severe penalty than the two dissenting Judges would have imposed? Is this the "plain case" of which *Burr* speaks where the action below was flagrantly improper"?

Lastly, since the District Court concluded from its "independent determination" that disbarment was the correct remedy, would not the majority below have acted improperly if they had elected to follow the State decision? If two reasonable persons can differ on a matter, and each has an independent duty to act on the matter, how is the integrity of the judicial process maintained if one of the two fails to function?

CONCLUSION

For the reasons set forth herein it is respectfully submitted that the petition for a writ of certiorari should be granted, that the decision of the Court of Appeals should be reversed and that the Order of the District Court should be reinstated.

Respectfully submitted,

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